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Supreme Court, U.S.
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No. ..-...

IN THE

# Supreme Court of the United States

October Term, 1982

JEFFREY ALTMAN,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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## Questions Presented.

1. Whether the Court below properly construed its decision and the law in *United States v. Beecroft* (1979, 9th Cir.) 608 F.2d 753 and *United States v. Piepgrass* (1970, 9th Cir.) 425 F.2d 194, where it held that an intent to defraud may be inferred from knowledge that a scheme operates in a deceitful manner.

2. Whether the Court below properly construed its decision and the law in *United States v. Kaplan* (1977, 9th Cir.) 554 F.2d 958, where it held that the intent to defraud may also be inferred from a failure to put a stop to a deceitful scheme.

3. Whether it was error on the part of the Court below in failing to base its judgment on the decisions and the law in *United States v. Windsor* (1967, 9th Cir.) 384 F.2d 535 and *Walker v. United States* (1966) 384 U.S. 952, 86 S.Ct. 1573, 16 L.Ed.2d 548.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Statute Involved | 2 |
| Statement | 2 |
| Reasons for Granting Writ | 8 |
| Conclusion | 9 |
| Appendix A. Opinion of the Court of Appeal App. p. | 1 |
| Appendix B. Order. Petition for Rehearing Is Denied | 7 |


## TABLE OF AUTHORITIES CITED

### Cases


| | | |
|---|---|---|
| United States v. Beecroft (1979, 9th Cir.) 608 F.2d 753 | i, | 8 |
| United States v. Kaplan (1977, 9th Cir.) 554 F.2d 958 | i, | 8 |
| United States v. Piepgrass (1970, 9th Cir.) 425 F.2d 194 | i, | 8 |
| United States v. Windsor (1967, 9th Cir.) 384 F.2d 535 | i, | 8 |
| Walker v. United States (1966) 384 U.S. 952, 86 S.Ct. 1573, 16 L.Ed.2d 548 | i, | 8 |


### Statutes


| | |
|---|---|
| United States Code, Title 18, Sec. 1341 | 2 |
| United States Code, Title 28, Sec. 1254(1) | 2 |

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*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

JEFFREY ALTMAN, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

### Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported. A copy of the opinion appears in Appendix A hereto.

## Jurisdiction.

The judgment of the Court of Appeals was entered on July 27, 1982. A timely petition for rehearing was denied November 30, 1982. A copy of the decision of the Court of Appeals appears in Appendix B hereto.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## Statute Involved.

18 U.S.C. Section 1341.

## Statement.

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on twenty counts of an indictment charging the defendant Jeffrey Altman with mail fraud in violation of Title 18 U.S.C. Section 1341. In essence, it alleged a two-part scheme: (1) to solicit advertisements for a business directory without the intention of ever publishing; and, (2) to send invoices to the business even though no advertisement had been ordered.

As an association, Steven Powers and Mark Fishman purchased a publication known as the "Big Book of Metalworking Machinery" (hereinafter referred to as "BBMM"), for $14,000.00 cash and note from a company known as Zulch and Zulch (R.T.* 41-44). The assets were then transferred to Lexington Corporation, owned sixty percent by Powers and forty percent by Fishman. Together, Fishman and Powers called the advertisers to solicit the sale of a new edition of BBMM containing their advertisements (R.T. 45). From August to December, 1975, approximately five

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*R.T. refers to the Reporter's official transcript of petitioner's trial.

or six ads were sold for the new edition at $300.00 per ad (R.T. 82-83).

In November, 1975, a meeting was held between Powers, Fishman, Skala and petitioner wherein an agreement was reached, in principle, to merge Lexington Corporation into MCB Systems, Inc. (hereinafter referred to as "MCB") (R.T. 56). MCB was a public corporation with approximately 1170 shareholders, engaged in diversified operations with its main activity being a brokerage house for a barter system (R.T. 791-2). The merger was predicated upon an idea to expand directory advertisement sales into the area of the banking industry. MCB had published a directory in connection with its barter system activities and it was thought that MCB would therefore have the ability to use its existing resources to economically put together a directory in another area.

An agreement for reorganization between Lexington and MCB was drafted by Fishman, an attorney, and was signed by Powers, Fishman, Skala and petitioner on February 23, 1976. The agreement provided in substance that Lexington would first issue shares of stock to Skala and petitioner, and additional shares of stock to Powers. Skala, petitioner and Powers would each have 30% of Lexington's stock and Fishman would have approximately 10% (R.T. 56-58). Thereafter, Powers, Fishman, petitioner and Skala would all exchange their Lexington stock for MCB stock and the two companies would merge (R.T. 57). Fishman filed with the Department of Corporations for approval to sell shares to effectuate the merger. Eventually, the merger was withdrawn. While the agreement was signed in February, 1976, Lexington Corporation had already transferred its operations to the offices of MCB in December.

At a February meeting, Steve Powers raised the name of Elaine Pector as a person with prior experience selling ads

for a banking directory (R.T. 160). It was recommended that she would be a good employee to operate Lexington's sales operations and could solicit ads for an expanded version of the original book to include banks and other industries called the "Big Book of Banking and Industry" (hereinafter referred to as "BBBI") (R.T. 146, 287). Powers testified that Pector had worked for him on a trial basis in December, 1975, but that she had to be controlled (R.T. 47, 64). It was decided that Powers would contact and attempt to negotiate an employee contract with Pector.

Pursuant to her publishers agreement, Pector hired a small sales force to assist her in the solicitation and sale of ads of which she would also make a commission (R.T. 562). These solicitations normally took place between 6:00 AM and 11:00 AM before Skala and Altman arrived, because of the time zone difference on the East Coast as well as the lower phone rates (R.T. 572). They had their own sales area, separate and apart from Skala and Altman. Lexington was only a small part of MCB system.

Mark Fishman became the liaison between Pector and MCB (R.T. 287). During this relationship, Pector never informed Fishman of what she was doing (R.T. 288). Fishman testified he never saw Pector nor was he involved in any way with her billing of clients (R.T. 272-3, 288). Fishman testified he never heard Pector make misrepresentations (R.T. 249). Pector did, however, show Fishman complaint letters about her from three state attorney generals, and he in turn showed them to Skala and made Altman aware of them (R.T. 165-6).

After discussing these complaint letters with Skala, Fishman told Skala he no longer wanted to be involved with the business operation of Lexington and would restrict his activities to being MCB counsel (R.T. 184-5). Thereafter, Fishman resigned as President of Lexington (R.T. 282-3).

In addition, Fishman was to respond to the complaints as corporate counsel. Petitioner testified that Fishman informed him that he had handled the complaints and that there was no problem (R.T. 880).

In late April, 1976, Skala asked petitioner to become President of Lexington Corporation. Even though Altman primarily ran the insurance division of MCB, petitioner agreed since his functions at MCB would not change (R.T. 859-61). His duties at Lexington were twofold. First, he would act as liaison between Fishman and Pector, and second, he would process Pector's commission checks (R.T. 741, 768-9, 861-2). Pector never reported to petitioner and he never regulated or monitored her sales routine (R.T. 861-68). Petitioner and Pector constantly argued over her commission checks (R.T. 865).

The defense stipulated that on or about August 13, 1976, Skala created a fictitious person, Yashika Mitsibishi, who was created to find an easy way to terminate Elaine Pector's sales contract with Lexington Corporation (R.T. 805-8). On August 19, 1976, Skala gave Pector a letter informing her that Yashika Mitsibishi wished that all sales personnel be dismissed (R.T. 504). When Pector confronted Skala as to the dismissal of her sales personnel, Skala informed her that there was room for her in "collections" to follow up her sales of advertising (R.T. 505-6).

Pector states that Skala told her the reason for the shift from "sales" to "collections" was because BBBI was going to be printed (R.T. 505). Thereafter, a few printers testified that Skala consulted them about estimates to print the BBBI. Skala was given estimates between $5,000.00 and $10,000.00 (R.T. 673, 680).

Skala testified that he designed a computer system to keep track of what companies owed money to Lexington and for

how long. The system was designed so that if someone didn't pay, the computer would automatically write them a letter informing them their account was overdue. Delinquent notices would automatically be sent out by the computer at 30-day intervals unless payment was received and credited to their account (R.T. 743-45).

Skala testified that Pector was in charge of generating input into the computer as to who owed what (R.T. 745). She had her secretary type up a statement and had a copy sent to the computer center for input (R.T. 745). When payments were received, Pector's cousin, Eileen, would mark them off on a roster and send them over to Datagraphics for input (R.T. 748).

The first set of overdue notices were sent out on or about August 26, 1976. Pector was aware these were going to be sent out (R.T. 506). Thereafter, but before the second batch was sent out, Pector informed Skala there were errors or complaints on the first computer run (R.T. 512). Pector could not recall discussing these complaints with petitioner (R.T. 512). Pector testified that Skala told her it was a mistake, computer error (R.T. 514). Skala testified that he told Pector that all she had to do is prepare adjustment slips and once submitted to the computer, the errors would be corrected (R.T. 753). As to the complaints, Skala asked Pector if it was something she could handle and, if so, she should. Otherwise, she should see Fishman about it. She replied, "Fine" (R.T. 754). Skala never reviewed Pector's invoices or correspondence (R.T. 820). Skala was totally unaware of the complaints as evidenced by the stipulations (R.T. 754). On or about October 21, 1981, a second batch of delinquent notices were sent out (R.T. 19E).

On or about October of 1976, Harold Shafer contacted petitioner regarding the sale of BBMM and the BBBI (R.T. 404-5). While petitioner handled the preliminary negotia-

tions, he referred Shafer to Skala about price (R.T. 870, 406). Petitioner did, however, show Shafer a list of BBBI's accounts receivable (R.T. 409-10). After receiving a computerized analysis of Lexington, Skala decided to sell the BBBI to Shafer (R.T. 788-9, 786). By agreement of November 16, 1976, Harold Shafer bought all rights to the BBBI. By said contract, Shafer expressly assumed the obligations to publish the BBBI.

## REASONS FOR GRANTING WRIT.

Petitioner argues that the Court incorrectly ruled in its factual analysis as well as its reliance on *United States v. Beecroft* (1979, 9th Cir.) 608 F.2d 753, *United States v. Piepgrass* (1970, 9th Cir.) 425 F.2d 194 and *United States v. Kaplan* (1977, 9th Cir.) 554 F.2d 958. The Court's reliance indicates that an intent to defraud may be *inferred* from a failure to stop a deceitful scheme. However, such reliance is contrary to the case of *United States v. Windsor* (1967, 9th Cir.) 384 F.2d 535 where it was held that his knowing participation in a scheme to defraud is an essential part of the government's case. This element may be established circumstantially, but cannot be based upon constructive knowledge because of facts known to others with whom appellant was involved in the scheme. Moreover, the case of *Walker v. United States* (1966) 384 U.S. 952, 86 S.Ct. 1573 held that circumstantial evidence may well be as trustworthy as direct evidence, but we must be mindful that the requisite mental state in a prosecution for fraud is specific intent to defraud and not merely knowledge of shadowy dealings.

Petitioner argues that the inferences relied upon, as well as the legal conclusions relied upon, were insufficient to establish his conviction as a result of the fact that they imputed to him constructive knowledge of acts undertaken by others in furtherance of the alleged scheme. In the event the Court's interpretation is held correct, there would be virtually no bar to conviction for mail fraud based upon constructive knowledge.

**Conclusion.**

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and ruling of the Court of Appeals of the Central District of California.

Respectfully submitted,

BROWN, BARON & MADDEN,

By PAUL FITZGERALD,

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